Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

October Term, 1997

NEWTON VEDALIER,

Petitioner,

versus

FALCON DRILLING COMPANY, INCORPORATED, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the United States Court of Appeals for the Fifth Circuit failed to comply with the statutory duties imposed upon it by The Congress as "a court of record" directed to hear and determine cases and controversies properly coming before it and violated Petitioner's statutory right to review of the adverse final Judgment rendered by the District Court, when it failed to articulate the legal reasoning underlying its decision on Petitioner's non-frivolous appeal taken from said Judgment (a decision that reads in its entirety: "We have reviewed the record and the briefs on appeal and conclude that no clear error occurred.")?

(2) Whether the practice of the United States Court of Appeals for the Fifth Circuit in failing and/or refusing to articulate the legal reasoning on some non-frivolous appeals, such as the appeal taken by Petitioner, render the appeal meaningless in violation of Petitioner's constitutional right to due process of law?

(3) Whether the practice of the United States Court of Appeals for the Fifth Circuit in articulating the legal reasoning underlying its decisions entered on some non-frivolous appeals, while failing and/or refusing to articulate any such reasoning on other non-frivolous appeals, such as the appeal taken by Petitioner, violates Petitioner's constitutional right to equal protection of the laws?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit whose decision is sought to be reviewed were:

Newton Vedalier, Petitioner

Falcon Drilling Company, Incorporated, Respondent

Liverpool & London Steamship Mutual Protection & Indemnity Association, Respondent

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

Petitioner, Newton Vedalier, brought this civil action against Respondents, Falcon Drilling Company, Incorporated, and Liverpool & London Steamship Mutual Protection & Indemnity Association, under the Jones Act and the General Maritime Law of the United States to recover damages for personal injuries Petitioner sustained, while working for Respondent Falcon aboard one of its inland drilling barges. Petitioner's civil action was tried from March 25, 1996, to March 28, 1996, before Senior United States District Judge Richard J. Putnam, sitting without a jury. On April 22, 1996, Judge Putnam issued a Memorandum Ruling wherein the District Court (a) rejected Petitioner's claims against Respondent Falcon based on negligence and unseaworthiness, (b) rejected Petitioner's claim against Respondents for attorney's fees based on Respondent Falcon's failure to pay maintenance and cure and (c) awarded Petitioner maintenance and cure from October 6, 1995, until Petitioner reaches maximum medical cure.[1] On August 21, 1996, a Judgment was entered in accordance with the District Court's ruling.[2]

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[1] See Memorandum Ruling annexed hereto at Appendix pp. App. 4 through App. 22.

[2] See Judgment annexed hereto at Appendix pp. App. 23 through App. 25.

In an unpublished two (2) page opinion, the United States Court of Appeals for the Fifth Circuit summarily affirmed the District Court's Judgment.[3] Without revealing the legal reasoning underlying its decision, the Court of Appeals disposed of Petitioner's appeal in one (1) sentence: "We have reviewed the record and the briefs on appeal and conclude that no clear error occurred."

STATEMENT OF THE BASIS FOR JURISDICTION

On October 1, 1997, the United States Court of Appeals for the Fifth Circuit entered a decision, summarily affirming the final judgment rendered in this case by the United States District Court for the Western District of Louisiana. Petitioner did not file a Petition for Rehearing. This Court has jurisdiction to review the decision entered by the Court of Appeals under 28 U.S.C. § 1254(1), which effectuates its appellate jurisdiction granted by U.S. Const. Art. III, Section 2, cls. 1 and 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The pertinent constitutional provisions involved in this case are:

(1). U.S. Const. Art. I, § 8, cl. 9:

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[3] See unpublished opinion of the United States Court of Appeals for the Fifth Circuit annexed hereto at Appendix App. 1 through App. 3.

"Section. 8. The Congress shall have Power

. . . .

To constitute Tribunals inferior to the supreme Court; . . . ". (Emphasis added).

(2). U.S. Const. Art. III, § 1, cl. 1:

"**Section 1.** ***The judicial Power of the United States, shall be vested*** in one supreme Court, and ***in such inferior Courts as the Congress may from time to time ordain and establish.***" (Emphasis added).

(3). U.S. Const. Amend. 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation." (Emphasis added).

The pertinent statutes involved in this case are:

(1). 28 U.S.C. § 43(a):

"§ 43. Creation and composition of courts

(a) ***There shall be in each circuit a court of appeals, which shall be a court of record,*** known as the United States Court of Appeals for the circuit." (Emphasis added).

(2). 28 U.S.C. § 46(c):

"§ 46. Assignment of judges; panels; hearings; quorum . . . . .

(c) ***Cases and controversies shall be heard and determined by a court or panel of not more than three judges*** . . . ". (Emphasis added).

(3). 28 U.S.C. § 1291:

"§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . ". (Emphasis added).

STATEMENT OF THE CASE

The United States District Court for the Western District of Louisiana had jurisdiction to hear Petitioner's claims against Respondents based on the Jones Act and the General Maritime Law of the United States, which jurisdiction was conferred upon said Court by Article III, Section 2, cl. 1, of the Constitution, as implemented by The Congress in 28 U.S.C. §§ 1331 and 1333. Petitioner's claims arose out of an incident that occurred on July 2, 1994, while Petitioner was employed as a floorhand aboard Respondent Falcon's inland posted drilling barge, the *D/B FALCON NO. 9*. On that date, Petitioner was ordered by his superiors to enter and clean the ballast tanks of the *D/B FALCON NO. 9*, while said vessel was being towed from an offshore location in the Gulf of

Mexico to Lake DeCade in Terrebonne Parish, Louisiana, where the vessel was to be stacked.

Petitioner had no previous training or experience in this operation. Petitioner was assigned to work with another floorhand, but none of Respondent Falcon's supervisory personnel ever went to the area where Petitioner was working to observe the work and ensure that it was being completed in a safe manner. At the time he was injured, Petitioner had descended into the Port Ballast Tank No. 3, which was extremely muddy with the only illumination provided by a 100 watt drop light. Petitioner moved away from the ladder which he had climbed down to make room for a fellow employee, who was to assist him in cleaning the tank. Petitioner was then confronted with three (3) choices, i.e., (1) he could move away from the ladder by walking through the mud on the floor of the tank, or (2) he could stand on I-beams that ran the length of the tank and which were covered with mud or (3) he could clear a path through the mud with a water hose. Petitioner chose the third alternative, but was injured when he fell because of a combination of slippery footing in the mud and movement of the vessel as it was being towed.

With respect to liability, Petitioner asserted claims of negligence against Respondents based on the conduct of Respondent Falcon in ordering him to clean the ballast tank of the *D/B FALCON NO. 9*, while it was being towed. Petitioner further alleged that Respondent Falcon was negligent in failing to properly train and supervise him in connection with the cleaning of the ballast tank. Finally, Petitioner alleged that the *D/B FALCON NO. 9* was unseaworthy by virtue of Respondent Falcon's failure to

provide a sufficient crew to accomplish the task of cleaning the ballast tank and the failure to provide sufficient lighting in said tank. As a related matter, Petitioner alleged that Respondents were arbitrary and capricious in failing to pay maintenance and cure.

Petitioner's claims were tried before the District Court sitting without a jury in a trial that lasted four (4) days. Approximately one (1) month after the trial concluded, the District Court issued a Memorandum Ruling wherein it rejected Petitioner's claims against Respondents based on Respondent Falcon's negligence, the unseaworthiness of the *D/B FALCON NO. 9*, and Respondent Falcon's arbitrary and capricious failure to pay maintenance and cure. That portion of the District Court's Memorandum Ruling devoted to its decision on Petitioner's claims of negligence, unseaworthiness and failure to pay maintenance and cure occupies approximately eighteen (18) pages of letter-size paper not counting the introductory portion thereof or its discussion on Petitioner's status as a seaman.

Petitioner timely appealed the District Court's dismissal of his claims to the United States Court of Appeals for the Fifth Circuit. In accordance with the Court of Appeals' Local Rules and Internal Operating Procedures, Petitioner's appeal was placed on its summary calendar for disposition without oral argument. See I.O.P. – Screening that follows Local Rule 34.13. On October 1, 1997, the Court of Appeals entered its decision on Petitioner's appeal, affirming the District Court's Judgment. As noted, the body of the Court of Appeals' opinion occupies less than two (2) letter-size pages with all but one (1) sentence thereof devoted to a recitation of Petitioner's

claims, the District Court's ruling, Petitioner's arguments on appeal and Respondents' arguments on appeal. In the aforementioned sentence, the Court of Appeals affirms a ruling that took the District Court more than eighteen (18) pages to set out: "We have reviewed the record and the briefs on appeal and conclude that no clear error occurred."

LAW AND ARGUMENT

This case presents this Court with an important question of federal law, which has not been, but should be, settled by this Court, i.e., whether a Court of Appeals fails to comply with the statutory duties imposed upon it by The Congress as "a court of record" directed to hear and determine cases and controversies properly coming before it and violates an appellant's statutory right to review of an adverse final Judgment rendered by a District Court, when it fails to articulate the legal reasoning underlying its decision on a non-frivolous appeal taken from said Judgment. The national importance of this Court's resolution of this question is manifest as a decision requiring the Courts of Appeals to articulate the legal reasoning underlying every decision on a non-frivolous appeal would impact upon the judicial business of every such court. However, despite the increased workload such a ruling might place on the Courts of Appeals, Petitioner asserts a proper resolution of the question presented is that such articulation is required for two (2) reasons, to-wit: (1) to enable a party to the appeal to intelligently and effectively assess the Court of Appeals'

decision thereon to determine whether a Petition for Rehearing, Suggestion for Rehearing In Banc and/or a Petition for a Writ of Certiorari to this Court is/are warranted and (2) to enable this Court to intelligently and effectively assess the Court of Appeals' decision to determine whether it should grant or deny any Petition for a Writ of Certiorari filed in the case.

U.S. Const. Art. I, § 8, cl. 9, gives to The Congress the power to create tribunals inferior to this Court such as the Courts of Appeals. Once The Congress creates these lower courts, U.S. Const. Art. III, § 1, cl. 1, vests said courts with the judicial power of the United States. The Congress exercised its power to create the various Courts of Appeals by enacting 28 U.S.C. § 43(a) (and its predecessors), which specifically provides that each such court "shall be a court of record, . . . ". In 28 U.S.C. § 46(c), The Congress specifically directs that cases and controversies shall be heard and determined by the Courts of Appeals. Finally, in 28 U.S.C. § 1291, The Congress confers jurisdiction upon the Courts of Appeals to hear appeals from all final decisions of the District Courts. Petitioner takes the essential position that a Court of Appeals such as the United States Court of Appeals for the Fifth Circuit, as "a court of record" directed by The Congress to hear and determine cases and controversies properly coming before it, is required, as a matter of constitutional and statutory law, to set forth the legal reasoning that underlies its decisions on non-frivolous appeals.

The best legal statement in support of Petitioner's position is found in the dissent written by Chief Judge Holloway, and joined in by Circuit Judges Barrett and Baldock, in ***Re Rules of the United States Court of***

Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d 36 (10th Cir. 1992), wherein Chief Judge Holloway, in criticizing the no-citation rule adopted by the United States Court of Appeals for the Tenth Circuit, said:

> ***"Nevertheless, the basic purpose for stating reasons within an opinion or order should never be forgotten – that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination."*** (Emphasis added). *Id.* at 38.

See also Reynolds & Richman, ***An Evaluation of Limited Publication in the United States Courts of Appeal: The Price of Reform***, 48 U.Chi.L.Rev. 573, 598-629 (1981); and, Reynolds & Richman, ***The Non-Precedential Precedent***, 78 Col.L.Rev. 1167 at 1199-1204 (1978).

This Court in *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975), in a discussion of the concept of "standing" itself described the sole reason for the existence of the judicial power under U.S. Const. Art. III, holding: ***"The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally."*** Yet, the practice of the Courts of Appeals in general, and the United States Court of Appeals for the Fifth Circuit in particular (as in the case *sub judice*), of issuing opinions without articulating

reasons therefor makes it virtually impossible for a litigant such as Petitioner to obtain redress or otherwise protect against injury because the litigant is unable to intelligently and effectively determine whether to challenge the decision on the ground that it cannot "***withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law*** [the Court of Appeals] ***must follow, and as to its consistency with*** [said court's] ***precedents***."

Petitioner is unable to find any case wherein this Court approves of summary procedures and calendars for disposition by the Courts of Appeals of non-frivolous appeals. See Footnote 1 of the dissent in ***Re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986***, supra. Petitioner certainly cannot find any cases wherein this Court has held that a Court of Appeals may decide a non-frivolous appeal without articulating the legal reasoning underlying its decision. Parenthetically, the failure of the United States Court of Appeals for the Fifth Circuit to set forth the legal reasoning underlying its decision in the case *sub judice* has deprived Petitioner of the ability to make a considered and justified request for rehearing and/or rehearing in banc to said Court of Appeals and/or for Certiorari to this Court on the merits.

The Courts of Appeals' practice of deciding non-frivolous appeals without articulation of the legal reasoning underlying their decisions also impacts on this Court's ability to make intelligent and effective assessments of cases or controversies coming to its attention to determine whether to grant or deny any Petition for a Writ of Certiorari that might be filed therein. The United

States Court of Appeals for the First Circuit, in *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978), provided a good description of this problem in the context of district court orders issued without reasons, holding:

> "In holding that a hearing is required in the case at bar, we do not decide whether a formal evidentiary hearing is required in every instance where an award of attorney's fees is contested. ***But we do hold that the summary disposition of the threshold question of entitlement in an informal unrecorded settlement conference followed by issuance of an order denying counsel fees without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity***. See [citations omitted]. ***Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion***. [citation omitted]." (Emphasis added). *Id.* at 647.

The Courts of Appeals' practice in deciding non-frivolous appeals without articulating the legal reasoning that underlies their decisions creates problems identical to those identified in *Sargeant*, supra. Certainly, no rational distinction can be drawn between a District Court's decision on a matter coming before it for judicial resolution and a Court of Appeals' decision on a non-frivolous appeal. If the failure of the District Court to provide reasons for its decision violates ***"minimum standards of procedural fairness and regularity"***, the same is true of a Court of Appeals' decision on a non-frivolous appeal issued without reasons. ***"Nor does*** [a decision] ***issued*** [by

a Court of Appeals] ***without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's"*** exercise of its appellate review functions.

This Court has previously encountered problems in exercising its discretionary Certiorari powers caused by the failure of Courts of Appeals to articulate the legal reasoning underlying their decisions on non-frivolous appeals. In *Salem v. United States Lines Company*, 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962), this Court had to guess at the basis for the Court of Appeals' decision, which held that the District Court erred in allowing a jury to consider certain issues without the benefit of expert testimony. This Court's inability to determine the bases of the Court of Appeals' decision:

> "***If the holding of the Court of Appeals is*** only that in this case there are peculiar fact circumstances which made it impossible for a jury to decide intelligently, ***we are not told what those circumstances are***, and our examination of the record discloses none. ***If the holding is*** that claims which might be said to touch upon naval architecture can never succeed without expert evidence, ***neither the Court of Appeals nor the respondent refers us to authority or reason for any such broad proposition.***" (Emphasis added). *Id.* at 370 U.S., at p. 35, 82 S.Ct., at p. 1122.

Similarly, in *Goett v. Union Carbide Corporation*, 361 U.S. 340, 80 S.Ct. 357, 4 L.Ed.2d 341 (1960), this Court was left guessing as to the bases for a Court of Appeals' decision:

> "Here the Court of Appeals did not decide which standard the West Virginia Act adopted. ***It did not articulate on what basis it was applying federal law if in fact it was;*** there is no intimation that it believed the West Virginia Act incorporated the maritime law's negligence standard, and in fact it expressly left open the question whether that Act incorporated the maritime standard of seaworthiness. ***It seems more likely to us to have passed on the negligence issue as a matter of federal maritime law;*** it cited only cases applying the general maritime law's and the Jones Act's concepts of negligence, and general treatises, 46 U.S.C.A. s 688; no West Virginia authority was relied upon. ***The least that can be said is that it is highly doubtful which law the Court of Appeals applied;*** and so ***in the absence of any expression by it of which standard the West Virginia Act adopted,*** we do not believe we can permit its judgment to stand after our intervening decision in The Tungus." (Emphasis added). *Id.* at 361 U.S., at pp. 342 and 343, 80 S.Ct., at pp. 358 and 359.

In the exercise of its discretionary Certiorari powers which presuppose that questions of grave national importance are being presented for review and resolution, this Court should not be placed in the untenable position of having to guess at the legal reasoning underlying a decision rendered by a Court of Appeals. Yet, this is exactly the position in which this Court would find itself, if it decided to exercise it's Certiorari powers to review the decision of the United States Court of Appeals for the Fifth Circuit on the merits of the case *sub judice*, i.e., a decision that reads in its entirety: "We have reviewed the

record and the briefs on appeal and conclude that no clear error occurred."

Petitioner also contends that the failure and/or refusal of the United States Court of Appeals for the Fifth Circuit to articulate the legal reasoning underlying its decision entered on Petitioner's non-frivolous appeal violates Petitioner's right to due process of law secured by U.S. Const. Amend 5. Petitioner has already cited *Sargeant*, supra, wherein the United States Court of Appeals for the First Circuit held that a District Court's summary disposition of the issues before it followed by its issuance of an order that did not set forth an adequate statement of the reasons therefor did not meet minimum standards of procedural fairness and regularity. Certainly, there is no rational reason to treat a decision entered by a Court of Appeals on a non-frivolous appeal without an articulation of the legal reasoning underlying the decision any differently, i.e., such a decision "does not meet minimum standards of procedural fairness and regularity." With respect to procedural due process, this Court has held: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" See *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Obviously, an appellant such as Petitioner has not been heard in "a meaningful manner" by a Court of Appeals, when the decision on his non-frivolous appeal is entered without a deliberate articulation of its rationale and without any appraisal of the factors underlying it. This is so because such a decision does not provide a basis for assessing whether it is "able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the

Constitution and the statutory and decisional law [the Court of Appeals] must follow, and as to its consistency with [the Court of Appeals'] precedents." The hearing afforded Petitioner on his non-frivolous appeal by the United States Court of Appeals for the Fifth Circuit in the case *sub judice* is meaningless given that Petitioner is precluded from assessing the correctness of the decision for the purpose of taking further action, i.e., the filing of a Petition for Rehearing, a Suggestion for Rehearing In Banc and/or a Petition for a Writ of Certiorari.

Petitioner's final contention is that the practice of the United States Court of Appeals for the Fifth Circuit in articulating the legal reasoning underlying its decisions entered on some non-frivolous appeals, while refusing to provide such an articulation with respect to its decision entered on Petitioner's non-frivolous appeal, denies to Petitioner the right to equal protection of the laws secured by U.S. Const. Amend. 5. With respect to this constitutional right, this Court has repeatedly held that the Fifth Amendment's Due Process Clause encompasses equal protection principles. See, e.g., *Mathews v. de Castro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); and, *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), and authorities cited therein. This Court succinctly described the protection afforded by the Equal Protection Clause of U.S. Const. Amend. 14, § 1, in *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), when it held:

> "The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The Equal Protection Clause does not forbid classifications. ***It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.*** [citation omitted]." (Emphasis added). *Id.* at 505 U.S., at p. 10, 112 S.Ct., at p. 2331.

Petitioner concedes that the practice of the United States Court of Appeals for the Fifth Circuit in classifying some non-frivolous appeals as warranting an articulation of the legal reasoning underlying the decision entered therein, while failing to provide such an articulation for the decision entered on other non-frivolous appeals does not jeopardize the exercise of a fundamental right or categorize on the basis of an inherently suspect classification. Thus, the Equal Protection Clause of U.S. Const. Amend. 14, § 1, and by analogy the applicable equal protection principles of U.S. Const. Amend. 5, would be satisfied, if there is a plausible policy reason for the classification. See, e.g., *Nordlinger*, supra. However, Petitioner cannot discern any plausible policy reason that would justify the practice of the United States Court of Appeals for the Fifth Circuit in providing an articulation of the legal reasoning underlying its decisions entered on some non-frivolous appeals, while denying such an articulation with respect to other non-frivolous appeals. The absence of a plausible policy reason is manifest, when the question is considered in the light of the statutory duties imposed upon the Courts of Appeals by The Congress in 28 U.S.C. §§ 43(a) and 46(c) to function as "court[s] of

record" and to hear and determine "[c]ases and controversies" over which said courts have appellate jurisdiction.

In deciding whether to grant Certiorari in this case, this Court should consider that the merits involve a denial of recovery of damages by a seaman injured in the service of his vessel. Petitioner's claims of liability based on negligence arise under the Jones Act (46 U.S.C. § 688), which this Court has previously determined on several occasions to be remedial legislation. In *Cosmopolitan Shipping Co., Inc. v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692 (1949), this Court described the remedial nature of the Jones Act, holding:

> ***"The Jones Act was welfare legislation that created new rights in seamen for damages arising from maritime torts. As welfare legislation, this statute is entitled to a liberal construction to accomplish its beneficent purposes.*** Compare [citations omitted]." (Emphasis added). *Id.* at 337 U.S., at p. 790, 69 S.Ct., at p. 1321.

Similarly, in *Atchison, Topeka and Santa Fe Railway Company v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), this Court reiterated a long line of jurisprudence describing the remedial nature of the Federal Employers Liability Act (45 U.S.C. §§ 51, et seq.), which the Jones Act makes applicable to seaman such as Petitioner, holding:

> ***"We have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to***

> ***accomplish [Congress'] objects.'*** [citation omitted]." (Emphasis added). *Id.* at 480 U.S., at p. 562, 107 S.Ct., at pp. 1413 and 1414.

Yet, in spite of the broad and liberal construction to be given the Jones Act to accomplish its beneficent purpose, the lower courts saw fit to reject Petitioner's negligence claims asserted against Respondent Falcon under said Act. Certainly, a District Court's Judgment, rejecting a seaman's claims for damages brought under the Jones Act, warrants careful review by the appropriate Court of Appeals with an opinion given that, at a minimum, provides a deliberate articulation of its rationale, including some appraisal of the factors underlying its decision. This Court's willingness to review and reverse the decisions of lower courts, rejecting the claims of railway employees for damages brought under the Federal Employers Liability Act, and the claims of seamen for damages brought under the Jones Act, further militates in favor of articulation of the underlying legal reasoning for the decision entered by the United States Court of Appeals for the Fifth Circuit in the case *sub judice*. See, e.g., *Rodgers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957); *Senko v. La Crosse Dredging Corporation*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957); *Webb v. Illinois Central Railroad Company*, 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503 (1957); *Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 76 S.Ct. 698, 100 L.Ed. 668 (1956); and, *Mahnich v. Southern S.S. Company*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

CONCLUSION

This case squarely presents this Court with the opportunity to decide a question of grave national importance, involving the nature and extent of the constitutional and statutory duties imposed upon the Courts of Appeals to hear and determine cases and controversies properly coming before said courts for judicial resolution. Petitioner, a Jones Act seaman whose claims for damages were rejected by the courts below, asserts the right to obtain an articulation of the legal reasoning that underlies the affirmance of the District Court's adverse Judgment by the United States Court of Appeals for the Fifth Circuit. Parenthetically, it is only with such an articulation that Petitioner can intelligently and effectively assess the Court of Appeals' decision "against the record evidence, as to its soundness under the Constitution and the statutory and decisional law [said court] must follow, and as to its consistency with [said court's] precedents" to determine whether he should file a Petition for Rehearing, a Suggestion for Rehearing In Banc and/or a Petition for a Writ of Certiorari. Otherwise, the sole reason for the existence of the judicial power, i.e., "to redress or otherwise to protect against injury to the complaining party" has not been fully realized, and Petitioner has not obtained the full protection of the law to which he is constitutionally and statutorily entitled.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this Court grant this Petition for a Writ of Certiorari, vacate the decision of the United States Court of Appeals for the Fifth Circuit and remand this case to said Court of

Appeals with instructions that it set forth the legal reasoning that underlies the decision it ultimately enters herein.

Respectfully submitted:

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30986
Summary Calendar

NEWTON VEDALIER,

Plaintiff-Appellant-Cross-Appellee,

versus

FALCON DRILLING COMPANY, ET AL.,

Defendants,

FALCON DRILLING COMPANY, INCORPORATED; LIVERPOOL & LONDON STEAMSHIP MUTUAL PROTECTION & INDEMNITY ASSOCIATION,

Defendants-Appellees-Cross-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 95-CV-25

(Filed Oct. 1, 1997)

Before JOLLY, BENAVIDES, and PARKER, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Newton Vedalier filed suit against Falcon Drilling Company, Incorporated and its liability insurer, Liverpool & London Steamship Mutual Protection & Indemnity Association, pursuant to the Jones Act and general maritime law for injuries he suffered on July 2, 1994, while a member of the crew of the D/B FALCON NO. 9. He also sought maintenance and cure benefits and punitive damages and attorney's fees for Falcon's alleged arbitrary and capricious failure to pay maintenance and cure.

Following a bench trial, the district court held that Vedalier was a Jones Act seaman, that an accident occurred, that Vedalier was injured as a result of the accident, that Falcon was not negligent in instructing Vedalier to clean the ballast tank while the rig was under tow, that the movement of the rig, if any, did not cause the accident, that Falcon properly trained and supervised Vedalier, and that the rig was seaworthy. The district court also found that Falcon was not arbitrary and capricious in its termination and refusal to reinstate maintenance and cure benefits. The district court awarded Vedalier maintenance and cure from October 6, 1995, until maximum medical cure. All parties filed appeals.

Vedalier argues that the district court erred in finding (1) that Falcon was not negligent in requiring him to work in the ballast tank while the rig was under tow, (2) that the movement of the rig was not a contributing cause of his accident, (3) that Falcon properly trained and supervised him, and (4) that Falcon was not arbitrary and capricious in its termination of maintenance and cure benefits.

Falcon argues that the district court erred in holding that the discogram was reliable, that surgery was necessary, and that Vedaleir was entitled to maintenance and cure from October 6, 1996, until maximum medical cure.

We have reviewed the record and the briefs on appeal and conclude that no clear error occurred. Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NEWTON VEDALIER	CIVIL ACTION NO. 95-0025
VERSUS	JUDGE PUTNAM
FALCON DRILLING COMPANY, INC.	MAGISTRATE JUDGE METHVIN

MEMORANDUM RULING

(Filed Apr. 23, 1996)

This matter arises out of injuries allegedly sustained by plaintiff, Newton Vedalier, on July 2, 1994 while he was working for Falcon Drilling Company, Inc. (Falcon) on an inland drilling barge. Vedalier filed this suit against Falcon under the Jones Act and General Maritime Law of the United States to recover damages for the alleged injuries, maintenance and cure benefits, and punitive damages and attorney's fees for Falcon's alleged arbitrary and capricious failure to pay maintenance and cure. Plaintiff subsequently amended his suit to name Liverpool and London Steamship Protection and Indemnity Association (Liverpool and London) which provided protection and indemnity coverage to Falcon. After a four-day bench trial, the court took the matter under advisement. We now assign reasons for judgment.

Background

Plaintiff began working as a floorhand for Falcon in 1993. On July 2, 1994, he was still working as a floorhand and was a member of the crew of the D/B FALCON No. 9

(Rig No. 9). Rig No. 9 is an inland posted drilling barge which can be floated from one location to another. Falcon owns and operates Rig No. 9.

Harlan Peak, a Falcon employee, was aboard Rig No. 9 in July 1994 and was working as the driller. Peak testified that on July 1, 1994, Rig No. 9 was located in the Gulf of Mexico south of Houma and the crew was preparing to move it to Lake DeCade where it was to be stacked. On July 1, 1994, two tugs, the Ivanhoe and Golden eagle, arrived at 6:00 p.m. (Plaintiff's Exhibit 2A – Daily Drilling Report dated July 1, 1994). On July 2, 1994, the two tugs began moving Rig No. 9 at approximately 2:15 a.m. *Id.* According to Peak, one tug was towing astern with a bridle of 15 to 20 feet ahead of the bow of Rig No. 9 and the other rig was pushing at the stern of the rig. Rig No. 9 arrived at Lake DeCade on July 2, 1994 at 3:00 p.m. and the tugs were released at 3:30 p.m. (Plaintiff's Exhibit 2B – Daily Drilling Report dated July 2, 1994).

Peak worked on the day tour which ran from 6:00 a.m. to 6:00 p.m. Peak testified that on the morning of July 2, 1994, he met with his crew which included the derrickman, Howard White, and the floorhands, plaintiff, Brad Prosperie, Robert Layton, and Robert Forbes. Ronald Toney testified that he also worked with this crew that morning.

At the pre-tour meeting, Peak informed the crew that they were going to be cleaning the ballast tanks. The job required that two men climb twenty-six feet down a ladder to the bottom of the ballast tank. The tanks had no permanent internal lighting but the crew used a drop light which had a 100 watt bulb. The men used a hose to

clean the mud from the bottom of the tanks. Each tank was approximately thirty feet long and fourteen feet high. Peak testified that inside the tanks there were metal beams which ran the length of the tank and from the ceiling to the beams below. Following the pre-tour meeting, the crew began cleaning the ballast tanks.

Plaintiff testified that on July 2, 1994, he cleaned two tanks without incident although he did experience some unsure footing due to the slippery mud. Plaintiff claimed that after he reached the bottom of the third tank, he slipped and fell sustaining injuries to his back. He immediately filled out an accident repot and was sent to Terrebonne General Medical Center for treatment.

Plaintiff was treated conservatively for several months and eventually underwent back surgery on October 10, 1995. Plaintiff's employer paid maintenance and cure benefits until October 6, 1995.

Seaman Status

Plaintiff filed this suit under the Jones Act and general maritime law claiming that he was a seaman at the time of the accident.

The United States Supreme Court has recently reiterated the rule that, for an employee to qualify as a seaman under the Jones Act, the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. Furthermore, the employee must have a connection to the vessel in navigation, or to an identifiable group of vessels, that is substantial in terms of both

its duration and nature. *Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995).

In this case, plaintiff began working for Falcon in 1993 as a floorhand. The parties stipulated that (1) plaintiff was a member of the crew of Rig. No. 9, (2) plaintiff was permanently assigned to Rig No. 9 and (3) Rig No. 9 was a vessel pursuant to the U.S. Coast Guard Certificate of Documentation (Plaintiff's Exhibit 17).

At the beginning of the trial, the court considered the foregoing and found that plaintiff was a seaman.

Towing of the Vessel

Plaintiff contends that his employer was negligent in directing the crew to clean the ballast tanks while the barge was under tow.

Vedalier began the cleaning job at 8:00 a.m. The rig had been under tow since 2:15 a.m. He and Prosperie cleaned the first tank and then moved to the second tank. Plaintiff testified that he and Prosperie finished cleaning one-half of the second tank then climbed out to take a break. At that time, Prosperie was called away and plaintiff again went down into the second tank and finished the cleaning job.

Plaintiff moved to the third tank. According to plaintiff, Howard White, the derrickman, told plaintiff to begin cleaning the third tank alone. Plaintiff testified that he dropped the light and hose into the third tank and then climbed down the ladder. When he reached the bottom of the tank, he hung the light on the side of the ladder. The mud was approximately one to one and one-half feet

deep. Plaintiff picked up the hose and washed around the bottom of the ladder to make a path so he could move away from the ladder. He testified that he moved from the ladder, slipped and fell backwards landing on a beam. He stated that he hit his lower back on the top of the beam and that his head hit the mud, and that both feet slipped out from under him. He thought that he fell because of the slipperyness of the mud and movement of the barge.

As plaintiff got up from the fall, Ronald Toney was coming down the ladder. Plaintiff immediately told Toney that he had fallen. Plaintiff climbed out of the tank using mostly his left arm. He stated that he could have used some help getting out of the tank but only one man could get in and out at one time. When plaintiff reached the top, he saw Prosperie and White and told them about the accident. Plaintiff then changed clothes and filled out the accident report. He was sent to Terrebonne General Medical Center to see a physician.

We now address defendants' contention that there was no accident. As stated by the court at the end of the trial and for the following reasons, we find that plaintiff has carried his burden of proof that an accident occurred.

Although there were no eyewitnesses to the accident, the court finds that plaintiff was a credible witness regarding his testimony about the accident. Furthermore, Toney testified that when he reached the bottom of the tank, he saw marks in the mud measuring about three by two feet in the area where plaintiff said he slipped and

fell. Based on Plaintiff's testimony and Toney's statements corroborating him, we conclude that an accident did in fact occur, and that plaintiff was injured as a result.

The court will next address whether the towing of the barge under the circumstances in this case constituted negligence on the part of plaintiff's employer. Under the Jones Act, the employer is responsible for any negligence, however slight, that played a part in producing the seaman's injury. *Zapata Haynie Corp. v. Arthur,* 980 F.d [sic] 287, 289 (5th Cir. 1992); *River Transp. Associates v. Wall,* 5 F.3d 97, 100 n.4 (5th Cir. 1993). The plaintiff's burden of proving causation is "very light" or "featherweight". *Id.* Applying the applicable law to the particular facts of this case, the court concludes that, even though the plaintiff's burden is "featherweight", plaintiff has not shown that his employer was negligent in ordering the cleaning job while the barge was under tow.

To corroborate his testimony that he experienced movement in the tank which caused him to fall, plaintiff presented the testimony of Vincent Murray and Ralph Theriot who were floorhands on Rig No. 9 in July 1994. They were assigned to clean the ballast tanks while on the night tour which began at 6:00 p.m. July 1, 1994. Their evidence was that while under tow the barge shifted from side to side causing movement in the tanks. When in shallow water, the barge would at times get stuck and then suddenly move ahead causing the crew to lose their balance.

The court finds that the testimony by Murray and Theriot is not persuasive and notes that they were not on plaintiff's tour but worked the previous shift which ran

twelve hours before plaintiff's shift. They were relieved of duty some seven or eight hours before plaintiff's accident, and had no knowledge of conditions in the tanks at the time of plaintiff's accident.

Robert Layton, Robert Forbes, and Ronald Toney were however cleaning the tanks while on the same shift plaintiff was working. All three testified that they felt no movement or sensation in any of the tanks that day. Although these three floorhands were not in the tank when plaintiff fell, the court finds their testimony credible and of probative value concerning what movement, if any, the workers felt while cleaning the tanks close to the time plaintiff's accident occurred.

In his own testimony, plaintiff did not describe with any specificity the movement he felt which allegedly caused him to fall. On cross-examination, defendants questioned plaintiff as follows:

> Question: Now, at the time of the accident, you didn't trip on anything, did you?
>
> Answer: No, sir.
>
> Question: Both feet just went out from under you?
>
> Answer: Yes, sir. With the movement – the combination of the mud and movement of the barge.

At the time of the accident the tow had left open water and was not subjected to wave action. It was proceeding slowly in an enclosed canal. There was no evidence of any other traffic in the waterway which might have caused a wake or other disturbance in the canal, or that the tow had been jerked or pushed suddenly by

either tug. On the contrary, the evidence preponderates that the barge was being towed smoothly and without interruption.

In further support of his claim, plaintiff filed into evidence a portion of the International Association of Drilling Contractors (IADC) manual which is an accident prevention manual compiled by the oilfield industry and generally accepted as the standard in the industry (Testimony of plaintiff's expert Robert Kubelka). The manual is not a regulation but rather a recommendation. It is the U.S. Coast Guard which is the governmental body which regulates inland barges and there is no Coast Guard regulation which prohibits the cleaning of ballast tanks while the barge is under tow (Testimony of defendants' expert C.E. Singletary).

The plaintiff filed into evidence Page 4 of the IADC manual which is entitled "Inland Drilling Barges – Moving the Barge" (Plaintiff's Exhibit 27). Plaintiff underscored the fourth line which reads "All sediment in compartments must be cleared before towing". *Id.* Plaintiff argued that this statement supports his contention that the ballast tanks should not be cleaned while the barge is under tow. A reading of the complete entry shows that its purpose is to recommend the safest method of moving a barge so as to avoid excessive rolling and pitching of the barge. The entry does not purport to make recommendations for the safety of crewmembers cleaning ballast tanks. While the better practice is stated in the IADC manual, the proof does not preponerate [sic] to the effect that any movement (assuming there was some movement) had any causal relationship to plaintiff's fall.

For all of the foregoing, the court concludes that Falcon was not negligent in instructing plaintiff to clean the ballast tank while the barge was in tow.

- Adequate Instructions and Supervision

Plaintiff contends that his employer was negligent in failing to properly instruct him on the safe procedures for cleaning ballast tanks and for failing to supervise the cleanup job.

Harlan Peak, the driller, testified that at the pre-tour safety meeting, he informed the crew of the procedure to be used in cleaning the ballast tanks. Specifically, Peak instructed the crew to take off the hatch cover, drop the light and hose into the tank, and climb down the ladder to the bottom of the tank. Peak also told the crew to move away from the ladder once they reached the bottom for safety reasons. Peak stated he informed the crew that the tanks contained mud and that they were to begin washing toward the jet. Peak also warned the crew not to walk on the beams in the tank.

Peak testified that he did not supervise the cleaning job because as driller, he had to be on the rig floor. Peak assigned Howard White, the derrickman to watch the area where the crew was working. According to Peak, the derrickman had a flashlight he could use to look down into the tank. No one was assigned to actually go down into the tanks to supervise the crew while they cleaned the tanks. To do so would be highly impractical if not impossible considering the fact that there were several tanks to be cleaned.

Considering the foregoing testimony and the plaintiff's testimony regarding the accident, the court finds that plaintiff's employer could not have provided any additional instruction or supervision which would have prevented the accident. This accident occurred when plaintiff stepped away from the ladder when he reached the bottom of the tank and began washing down the mud. We find for defendant on this issue.

Unseaworthiness

A shipowner has an absolute nondelegable duty to provide a seaworthy vessel to the crew members. *Brister v. A.W.I., Inc.*, 946 F.d [sic] 350, 355 (5th Cir. 1991). The shipowner is not under a duty to provide a perfect or accident-free vessel, but one which is reasonably suited for its intended purpose. *Phillips v. Western Co. of North America*, 953 F. 2d 923, 928 (5th Cir. 1992). In contrast to a Jones Act claim, the standard of causation for unseaworthiness is a more demanding one and requires proof of proximate cause. A plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness. *Brister, supra* at 355.

In this case, the court finds that Peak provided to plaintiff all necessary instructions and equipment required to properly clean the ballast tanks. The court also finds that the presence of the mud in the ballast tanks did not render Rig No. 9 unreasonably fit for its intended purpose. As previously stated, a shipowner is not under a duty to provide a perfect vessel, only one

which is reasonably fit. *Phillips, supra* at 928. Although the mud provided for slippery conditions in this case, the tanks in this type of rig take on mud in the normal course of operation. The court concludes that, under these circumstances, Rig No. 9 was not unseaworthy.

Maintenance and Cure

Defendant terminated plaintiff's maintenance and cure benefits on October 6, 1995. Defendant also did not pay for the treatment plaintiff received from Dr. Stuart Phillips on the grounds that the surgery was not medically necessary and that plaintiff had reached maximum medical cure. Plaintiff claims that the maintenance and cure benefits should not have been discontinued and should be paid through October 5, 1996.

1. Applicable Law

When a seaman becomes ill or injured while in the service of his ship, the shipowner must pay him maintenance and cure regardless of whether the shipowner was at fault or whether the ship was unseaworthy. *Guevara v. Maritime Overseas Corp.*, 59 F.3D [sic] 1496, 1499 (5th Cir. 1995). Maintenance is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. Cure is the right to necessary medical services. The employer must take all reasonable steps to insure that the seaman who is injured or ill receives proper care and treatment. *Guevara*, supra, at 1499-1500.

Payments for maintenance and cure benefits may be terminated based on an unequivocal medical determination that the seaman has reached maximum medical cure. *Johnson v. Marlin Drilling Co.*, 893 F.d [sic] 77, 79 (5th Cir. 1990); *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 388 (5th Cir. 1985). A seaman has reached maximum medical cure when it appears probable that further treatment will result in no betterment of the seaman's condition. *Tullos, supra.*

2. Medical Summary

In this case, the medical evidence shows that following the accident plaintiff was treated conservatively by two orthopedic surgeons, Dr. Clifton Shephard and Dr. John Cobb.

Dr. Shephard began treating plaintiff at defendant's request on July 5, 1994, three days following the accident. At the initial examination, plaintiff complained of back pain which radiated to his leg. There was some lower back tenderness but no spasm or neurological deficit. X-rays of the back were normal. Dr. Shephard concluded that plaintiff had strained his back.

MRI and CT scan results dated August 5, 1994 were normal. On August 17, 1994, Dr. Shephard concluded that plaintiff had reached maximum medical cure.

Dr. Cobb began treating plaintiff on August 31, 1994. Plaintiff complained of low back pain and intermittent numbness of the right leg. Dr. Cobb noted that plaintiff limped on the right side and had decreased range of motion due to pain. Sensation was slightly decreased in

the L5 distribution on the right. Dr. Cobb diagnosed a hyperextension injury to the back and recommended physical therapy.

Plaintiff complained that the physical therapy aggravated his symptoms. Dr. Cobb decided to administer an injection at L3 to L5 bilaterally to provide relief. Plaintiff reported to Dr. Cobb on December 28, 1994 that the injection provided 50% improvement. In January 1995, Dr. Cobb referred plaintiff to Dr. Daniel Hodges, a physical medicine and rehabilitation specialist, to see if plaintiff could live with the pain.

On March 31, 1995, Dr. Cobb felt as though he had nothing more to offer plaintiff. He suggested plaintiff continue seeing Dr. Hodges.

Dr. Hodges saw plaintiff from January 19, 1995 to June 8, 1995. Dr. Hodges recommended an aggressive therapy program when plaintiff did not improve with the home exercise program. According to Dr. Hodges, plaintiff made slow and steady progress.

On May 16, 1995, Dr. Hodges noted that plaintiff was having slightly increased complaints of midline lumbosacral pain particularly on palpation at the L4-5 spinous processes. Tenderness was present in the lumbosacral area and the sciatic notches were moderately tender. Dr. Hodges administered injections at the lumbosacral junction.

On June 8, 1995, Dr. Hodges recommended that plaintiff begin light duty work on a trial basis to see if he could perform light, or, eventually, medium to heavy work.

Dr. Phillips began treating plaintiff on June 1, 1995. Examination revealed muscle spasm and tenderness. Plaintiff's straight leg raising test was abnormal at the right at 30 degree to 45 degrees. Examination also showed some decrease in the L5 dermatome. X-rays showed plaintiff had hypermobility at L4-5. Dr. Phillips concluded that plaintiff had a dynamic instability to the lumbar spine from the hypertension injury. Dr. Phillips opined that when plaintiff fell, he went backwards farther than his ligaments could handle, tearing and stretching the ligaments.

Dr. Phillips recommended that plaintiff undergo a discography and post-discogram CT scan. Dr. Gerard Tassin, a diagnostic radiologist, performed these tests. Dr. Tassin stated that the test results showed a degenerative disc with annular fissures at L3-4, a small fissure extending to the left at L4-5 and degenerative changes extending to the interior of the disc at L5-S1. Plaintiff experienced pain at the L4-5 level.

Based on the results of the discogram and post-discogram CT scan, Dr. Phillips performed an anterior lumbar fusion at the L4-5 level on October 10, 1995. According to Dr. Phillips, he performed the fusion to restore stability to the joint that was hypermobile.

3. Reliability of Discogram

Defendants contend that the discogram results are unreliable because the discogram is a highly controversial diagnostic procedure and the results rely upon the patient's subjective complaints of pain. The court is unpersuaded by defendants's [sic] argument. Based on

the following testimony the court concludes that while the discogram may be considered controversial, it is not without merit.

Dr. Shepard [sic] objected to the use of discograms because of the controversial nature of the test. However, on cross-examination, Dr. Shepard [sic] stated that he was trained by a physician who cautioned his medical students not to place emphasis on the discogram. According to Dr. Shephard, Dr. Whitecloud, an advocate of the discogram, eventually replaced Dr. Shepard's [sic] medical professor. Dr. Shephard testified that if he had been taught by Dr. Whitecloud, he probably would be using the discogram today.

Dr. Cobb testified that discograms are performed throughout the United States and at the major spine centers. Dr. Cobb also testified that it is the most accurate test for revealing the internal workings of the disc and is clinically reliable. The discogram results provide the physician with useful information, including the source of the patient' [sic] pain. Dr. Cobb stated that discogram results provided objective information and that a patient cannot fake the results of this test.

Dr. Tassin testified that the discogram is not as controversial today as in the past. He felt plaintiff's test results were reliable because he performed the procedure in such a manner that plaintiff did not know when or into which disc the dye was being injected. Dr. Tassin stated that the discogram is a reliable diagnostic tool which gives the physician valuable information not available by other means.

Dr. Shephard questioned the procedure used by Dr. Tassin in plaintiff's discogram because Dr. Tassin made the injection on plaintiff's right side. Dr. Shepard [sic] stated that the injection should have been made on plaintiff's left side, the opposite side to which he was experiencing pain. Dr. Tassin explained, however, that it is normal and customary to lay the patient on his left side to perform the procedure on the right (Dr. Gerald Tassin's Deposition; Page 12 Lines 8-11).

Dr. Phillips further explained that the procedure of placing the needle on the nonsympathetic side was no longer used because "in the old days [the physician] used big needles". (Dr. Stuart Phillips' Deposition Page 38 Lines 1-5). According to Dr. Phillips, the physicians currently use a smaller needle "and it doesn't mess up one way or the other". *Id.*

Dr. Phillips testified that physicians use smaller needles in what is called the double needle technique. This technique involves placing the first needle into the patient then directing a second smaller needle inside the first to inject the dye. The use of the smaller needles obviate the need to place the patient on the nonsympathetic side. *Id.* at pages 38-39.

Dr. Tassin testified that by considering all of the findings in the test results, plaintiff's pain was probably due to a traumatic insult suffered by the L4-5 disc. (Dr. Gerald Tassin's Deposition Pages 66-67).

Based on the foregoing testimony, the court concludes that the diagnostic test results were reliable in this case.

4. Necessity of Surgery

Based on the medical evidence in this case, the court finds that plaintiff's maintenance and cure benefits should not have been terminated.

Dr. Shephard concluded that plaintiff had reached maximum medical cure as of August 17, 1994. However, on June 1, 1995, Dr. Philips [sic] diagnosed plaintiff as having hypermobility at L4-5 and a dynamic instability to the lumbar spine as a result of a hyperextension injury. Dr. Cobb had made essentially the same diagnosis on August 31, 1994 concluding that plaintiff suffered from a hyperextension injury to the lumbar spine with resultant facet syndrome. Furthermore, plaintiff's symptoms remained consistent throughout his course of treatment. These symptoms were only relieved after the surgery with plaintiff reporting a 60% to 70% improvement.

Dr. Phillips testified that it normally takes six months for the bone fusion to heal and another six months for the patient to reach maximum medical cure. According to Dr. Philips [sic], plaintiff was progressing well and on schedule.

For all the foregoing reasons, the court concludes that plaintiff shall be paid maintenance and cure, including the medical bills incurred for Dr. Phillips' treatment, until maximum medical recovery or "maximum cure" has been attained. Pursuant to a stipulation reached by the parties on the correct amount of maintenance, the court finds that plaintiff shall be paid at the rate of $20 per day from the date last paid until maximum cure is reached. Dr. Phillips testified that this would take place, in his opinion, one year after the surgery.

Failure to Pay Maintenance and Cure

In his complaint, plaintiff made a claim for punitive damages and attorney's fees for Falcon's alleged arbitrary and capricious failure to pay maintenance and cure. On September 22, 1995, Falcon filed a motion for summary judgment seeking dismissal of this claim. Plaintiff did not oppose the motion.

On December 12, 1995, the court issued a ruling granting Falcon's motion for summary judgment on the basis that punitive damages for failure to pay maintenance and cure were no longer available under the decision of *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). In the ruling, we noted that, although punitive damages were no longer available, a seaman could recover attorney's fees in maintenance and cure cases as long as the proper showing of "egregious" fault is made. *Guevara, supra.*

At the close of the evidence in this case, defendants made an oral motion for an order denying plaintiff an attorney fee award for failure to pay maintenance and cure. The court granted defendants' motion. The court based its ruling on the fact that plaintiff's employer considered the reports of Drs. Shephard, Cobb and Hodges in making the determination to discontinue paying plaintiff maintenance and cure. Dr. Shephard found that plaintiff reached maximum medical cure as of August 17, 1994. Dr. Cobb referred plaintiff to Dr. Hodges in January 1995 and Dr. Hodges found that plaintiff could begin light duty work on June 8, 1995. On October 4, 1995, Dr. Shephard reviewed additional information and once

again concluded that plaintiff reached maximum medical cure on August 17, 1994.

Based on the foregoing, the court concluded that plaintiff had made no showing of "egregious" fault amounting to callous, recalcitrant, arbitrary and capricious disregard of the seaman's right to maintenance and cure on the part of his employer. *Vaughn v. Atkinson*, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962); *Guevara, supra; Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987). Accordingly, the court granted defendants' motion to deny plaintiff's request for attorney's fees. We adhere to that ruling.

Based on the reasons set forth above, the court finds in favor of plaintiff and against defendants insofar as plaintiff is awarded maintenance and cure until he reaches maximum medical recovery from the injury and surgery. All other claims by plaintiff against defendant are dismissed.

The parties shall submit to the court a judgment prepared in accordance with this ruling within ten (10) days. Judgment will not be entered until a final judgment is signed and filed. The Court reserves the right to edit the foregoing reasons if deemed necessary.

JUDGMENT RENDERED at Lafayette, Louisiana this 22nd day of April, 1996.

/s/ Richard J Putnam
RICHARD J. PUTNAM
SENIOR U.S.
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NEWTON VEDALIER	CIVIL ACTION NO. 95-0025
VERSUS	
FALCON DRILLING COMPANY, INC.	JUDGE PUTNAM MAGISTRATE JUDGE METHVIN

JUDGMENT

(FILED AUG. 20, 1996)

This matter came on for trial on March 25, 26, 27, and 28, 1996, before the Honorable Richard J. Putman;

Present:

Lawrence N. Curtis and James P. Lambert, attorneys for Newton Vedalier

Edwin G. Preis, Jr. and Richard J. Hymel, attorneys for Falcon Drilling Company, Inc. and Liverpool and London Steamship Protection and Indemnity Association, Ltd.

After hearing the evidence, stipulations of the parties, and arguments of counsel, the court considering the law and evidence, and for the reasons assigned in the court's memorandum ruling dated April 22, 1996;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Newton Vedalier's claims against FALCON DRILLING COMPANY, INC. and LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, LTD. under the Jones Act and the General Maritime Law doctrine of unseaworthiness be and the same are hereby dismissed with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Newton Vedalier's claims against FALCON DRILLING COMPANY, INC. and LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, LTD. for compensatory damages and attorney's fees for FALCON DRILLING COMPANY, INC.'s alleged arbitrary and capricious failure to pay maintenance and cure be and the same are hereby dismissed with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that NEWTON VEDALIER be awarded maintenance and cure benefits against FALCON DRILLING COMPANY, INC. and LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, LTD. from October 6, 1995 until he reaches maximum medical cure, at the stipulated rate of TWENTY AND NO/100 ($20.00) DOLLARS per day, plus the outstanding medical bills incurred for Dr. Stuart Phillips' treatment in the amount of FIFTY-ONE THOUSAND NINETY-TWO AND 23/100 ($51,092.23) DOLLARS, plus prejudgment interest from the date each maintenance and cure benefit became due and payable prior to the rendition of judgment herein until paid and thereafter from the due date of each payment, and all costs of these proceedings.

Lafayette, Louisiana this 20th day of August, 1996.

/S/ Richard J Putman
RICHARD J. PUTNAM
SENIOR U.S.
DISTRICT JUDGE

JUDGMENT ENTERED 8-21-96
BY GM
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